v. Cohen,[11] where a man went voluntarily with officers of the law to have charges against him investigated, though the police testified that if an attempt to get away had been made, they would have stopped him.

There is little to be said in defence of the decision by the Court of Appeal. Though the opinions of the judges are lengthy, there is a notable failure to cite any case in support of this innovation in the law[12] and an analysis of the judges' opinions shows them to be but the expression of personal views, quite unsupported by authority, and there is no attempt to reason from established principles. It is not believed that this departure from settled principles of law is desirable. The question involved, though perhaps academic in the Meering Case, is not an unimportant one, for actions of this character are not infrequent, and in them the fact of imprisonment is often the principal one to be ascertained. The right of personal liberty is sufficiently protected when redress is given for its violation, and to extend the remedy to cases where the right has not actually been infringed is to impose liability on others for one's own actions and allow recovery therefor—a complete denial of the ancient maxim *volenti non fit injuria*. O. P. M.

THE CONSTITUTIONALITY OF WAGE REGULATION AS DEPENDENT ON THE CHARACTER OF THE EMPLOYMENT.—A statute of Rhode Island[1] entitled "Of diminishing danger to life in case of fire" provided that the theatre licensees of certain cities in that state should employ, at a salary of not less than three dollars per day, a suitable person approved by the board of fire commissioners thereof "to perform such duties as from time to time may be prescribed by such board to guard against fire." The act further provided that "no such employee . . . shall be discharged by such licensee or licensees from his said employment nor his salary reduced except with the prior approval of said board."

Previous to the passing of this statute one Gallagher had been employed as fireguard by a theatre licensee in the city of Providence at a salary of two dollars a day, and had been approved by the board of fire commissioners. On the refusal of the theatre licensee to increase Gallagher's salary to three dollars, as required by the statute, a complaint was brought against the licensee in question and he was found guilty. Sentence was stayed after defendant's motion to dismiss on the ground that the Act was

[11]24 New Zealand L. R. 625 (1904).

[12]A definition of "imprisonment" is taken from "Termes de la Ley" and Bird v. Jones, 7 Q. B. 742 (Eng. 1845) and Warner v. Riddiford, 4 C. B. N. S. 180 (Eng. 1858) are cited to show that restraint must be within a particular space, and that there can be imprisonment without in fact laying hands upon the person of the party imprisoned.

[1]Sect. 5, Chap. 131, R. I. General Laws, 1909, as amended by Chap. 1780 of R. I. Public Laws, 1919.

unconstitutional, and the case[2] was certified to the Rhode Island Supreme Court on this point. By a divided court the act was held unconstitutional as a violation of the Fourteenth Amendment of the Federal Constitution insofar as it fixed the wage to be paid to the fireguard and prevented the licensee from discharging him without the consent of the fire-commissioners.

The constitutionality of this act would seem to turn on a question of fact, viz., was the fireguard in the employ of the theatre licensee, or was he in reality in the employ of the fire-commissioners? If the former be true, it is, at least, open to question whether the case was correctly decided. If on the other hand, as the dissenting justices contend, no relation of master and servant existed between fireguard and theatre manager under the act, then, by the weight of authority the court's decision is wrong. If the fireguard's employment be private or even if it be "affected with a public interest" the problem resolves itself into a determination whether the legislature has made a valid use of its police power or whether the provisions of the act are so arbitrary as to deprive the defendant of his liberty to contract as guaranteed by the Fourteenth Amendment.

Admitting that the relation between fireguard and theatre manager is a purely private one, as is held by the majority of the court, a view supported by the phraseology of the act which specifically uses the word "employ" in speaking of the relationship, still the duties of the guard are clearly subject to the surveillance of the state, as they undoubtedly affect the safety of a large body of the public. In *Tannebaum v. Rehm*[3] an act of the legislature making it incumbent upon theatre managers to protect their patrons by submitting to the presence of a competent fireguard during performances was held a valid exercise of the state's police power, although the case turned on another point. The other cases which hold that the business of conducting a theatre is a purely private one, involve only the contractual relations existing between the theatre manager and his patrons.[4] But the majority of the court in the principal case, although recognizing that the fireguard's duties are affected with a public interest, conclude that the provision of the act relating to the wage and to the power to discharge is unessential insofar as the public safety is concerned, and is, for this reason, unconstitutional, since it does not bear any "real and substantial relation"[5] to the subject matter—the public safety over which the police power could be exercised. In other words, these clauses are too remote from the legitimate purposes of the act.[6] That a statutory provision

[2]O'Neill v. Providence Amusement Co., 108 Atl. 887 (R. I. 1920.)

[3]152 Ala. 494 (1907).

[4]See Buenzle v. Newport Amusement Assoc., 29 R. I. 23, 68 Atl. 721 (1908); Horney v. Nixon, 213 Pa. 20, 61 Atl. 1088 (1905); People v. Steele, 231 Ill. 340 (1907); *contra semble* Western Turf Assoc. v. Greenburg, 204 U. S. 359 (1906).

[5]That it was for the court to determine whether the statute in controversy bore "any real and substantial relation" to the exercise of the police power in order to test the constitutionality of the statute, was first laid down in the case of Mugler v. Kansas, 123 U. S. 623 (1887), and has been cited with approval in many subsequent cases.

not a police regulation cannot be made such by the use of a title calling it such, or by being placed in the same act with a police regulation by enactment under a title declaring a proper purpose for the exercise of the power, is well settled.[7] Of equal authority is the proposition laid down in *McLean v. Arkansas*,[8] where the court said, "The Legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the Legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no grounds for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power." From these two propositions and from numerous cases involving questions in which the police power of the state is arrayed against the "due process" clause of the Federal Constitution and *vice versa*, two tests have been applied by the courts: first, is the purpose of the act within the police power of the state?; second, is it arbitrary?

Applying these tests to the facts of the main case, while still assuming that the relation of employer and employee exists between the manager and the fireguard, as far as the clause fixing the wage is concerned, it is apparent that there is no authority which has gone so far as to allow the fixing of a minimum wage by the legislature in the case of a man in one form of employment, as contradistinguished from all other employments. Such an abridgement of the freedom to contract for labor, which is guaranteed by the Fourteenth Amendment,[9] would seem, as this court has pronounced it, arbitrary. Neither the reasoning of the United States Supreme Court in the case[10] which arose to test the constitutionality of the Adamson Act, nor that of the Oregon Supreme Court in the cases[11] upholding the constitutionality of minimum wage legislation could be cited as authority to uphold such wage legislation as is present in the main case. The former case is distinguishable because it was not a minimum wage law, but an emergency act, temporary in its nature; and subserving a public purpose of vital importance, viz., the prevention of a nation-wide strike and the consequent tying-up of commerce. The *Oregon* cases (*supra*), although they do involve the constitution-

[6]Unconstitutionality of an act because its end is too remote from the valid exercise of a federal power is a determining test in Adair v. U. S., 208 U. S. 161 (1908). Same test applied to state's police power, Coppage v. Kansas, 236 U. S. 1 (1914).

[7]*In re* Jacobs, 98 N. Y. 98 (1885); Lochner v. New York, 198 U. S., 45 (1904); Coppage v. Kansas (*supra*); Bemis v. State, 12 Okl. Cr. Rep. 114, 152 Pac. 456 (1915).

[8]211 U. S. 539 (1908).

[9]Adair v. U. S., (*supra*); Smith v. Texas, 233 U. S. 630 (1914); Coppage v. Kansas, (*supra*).

[10]Wilson v. New, 243 U. S. 332 (1917).

[11]Stettler v. O'Hara, 69 Ore. 519 (1914); Simpson v. O'Hara, 70 Ore. 261 (1914).

ality of the minimum wage, can be distinguished in that they relate solely to women and minors, the preservation of whose health is of importance to the community as a whole, whose physical structure and inability to organize for collective bargaining make them fit subjects for the protection of the police power and justify legislation of this character in their favor, notwithstanding the provisions of the Fourteenth Amendment.[12] The grounds upon which these decisions are based are inapplicable to the principal case.

But, as to their application of the proper law to the facts, a different question is presented. The dissenting judges strenuously assert, and the facts apparently sustain their conclusion, that the relation of master and servant, employer and employee, does not exist between manager and fireguard. "The relation of master and servant exists," says Judge Rathbun, "only when . . . (citing 26 Cyc. 966) 'the employer retains the right to direct the manner in which the business shall be accomplished, or, in other words, not only what shall be done, but how it shall be done.'" And again (citing 26 Cyc. 965), "He is to be deemed a master who has the superior choice, control, and direction of the servant, and whose will the servant represents, not merely in the ultimate result of the work but in the details." Applying the provisions of the statute (*supra*), admittedly constitutional in the opinion of the majority insofar as it provides for the stationing of the fireguard and the approval of the commissioners, the dissenting justice concludes that the essential elements of the relationship of master and servant as set forth in the above definition are entirely lacking, even though the statute expressly uses the word "employ" to express the relationship and even though the selection (subject, of course, to the approval of the commissioners) and payment are in the hands of the theatre manager.

A fortiori, then, if the fireguard is not in the relation of employee to the theatre manager, he is employed by the municipality, and hence is in public employment. It follows therefore, that his superiors, the fire commissioners, could be constitutionally vested with the right to discharge him.

In the matter of the compulsory payment of a public employee by a private citizen of a wage fixed by the legislature, the dissenting justices draw an analogy to the charging of inspection fees by a public officer against an individual engaged in a private business, the nature of which requires inspection to protect the welfare of the community. That the charging of such fees as are fixed by the legislature is not depriving the individual of his property without due process of law is well settled.[13]

[12]For cases in which the constitutionality of labor legislation in favor of women and minors has been upheld see Com. v. Wormser, 260 Pa. 44 (1918); Holcombe v. Creamer, 231 Mass. 99, 120 N. E. 354 (1918); Muller v. Oregon, 208 U. S. 412 (1908).

[13]Willis v. Standard Oil Co., 50 Minn. 290, 52 N. W. 652 (1892); Consolidated Coal Co. v. People, 186 Ill. 134, 57 N. E. 880 (1900); New Orleans v Kee, 107 La. 762, 31 So. 1014 (1920); Morgans S. S. Co., v Louisiana Board of Health, 118 U. S. 455 (1885).

It is submitted, however, that this legislation more nearly resembles the class of legislation upheld by the United States Supreme Court in the case of *Charlotte Railroad Co. v. Gibbs*,[14] whereby the railroads of the South Carolina were assessed the cost of the upkeep of a state railroad commission, or that which fixes a minimum wage for laborers employed by the municipality for the benefit of the property of an individual, against whose property the wage is assessed as a special tax, or who can be required to pay under a valid exercise of police power, provided the duty performed by the public servant comes within its scope. Or, as is said by the United States Supreme Court in the case of *Atkin v. Kansas*,[15] "The power belongs to a state as guardian of the people to prescribe conditions upon which public work will be done in its behalf, or on behalf of its municipalities," and adds that the manner of payment does not as such change the character of the work. Legislation of this class is upheld in *Malette v. Spokane*.[16] C. W. B. T.

DAMAGES FOR INCONVENIENCE AND ANNOYANCE BY WRONGFUL ACT OF TELEPHONE COMPANY.—It seems from a recent decision of the Court of Civil Appeals of Texas that a person can now recover damages for an injury to his temper, at least if the offending party happens to be a telephone company. In *Southwestern Telegraph and Telephone Co. v. Riggs*,[1] a verdict of $250 for vexation, annoyance and inconvenience, caused by the Telephone Co. wrongfully disconnecting the plaintiff's phone, was upheld as supported by the evidence and not so excessive as to show passion or prejudice.

That a telephone company can be held liable in a tort action for annoyance and inconvenience to a subscriber by wrongfully disconnecting his phone, as well as for actual pecuniary loss, is now fairly well established.[2] But as Pleasants, C. J. points out in his able dissenting opinion, the evidence in the principal case shows no inconvenience resulting directly from the plaintiff's inability to use his phone, and shows only the deleterious effect on the plaintiff's disposition caused by the untactful manner of the company's officials.

The plaintiff had in fact paid his bill, but the defendant's bookkeeper had accidentally credited the payment to "Capital 1923" instead of to "Capital 1928," the plaintiff's number, so that when the plaintiff tried to call his home from his office he was informed that his phone had been disconnected on account of

[14]142 U. S. 386 (1892).
[15]191 U. S. 207 (1903).
[16]77 Wash. 205, 137 Pa. 496 (1913), 51 L. R. A. (N. S.) 686.
[1]216 S. W. 403 (Tex. 1919).
[2]Carmichael v. Bell Telephone Co., 157 N. C. 21, 72 S. E. 619 (1911); Harbaugh v. Citizens' Telephone Co., 190 Mich. 421, 157 N. W. 32 (1916); Sommerville v. Chesapeake & Potomac Telephone Co., 258 Fed. 147 (1919).